IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER,
Petitioners,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY.
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS.

The brief of respondents' counsel emphasizes the necessity for an authoritative decision by this Court as to the extent of the jurisdiction of the Circuit Court of Appeals in proceedings arising out of bankruptcy laws.

Counsel disagree with the Circuit Court of Appeals, whose decision they are here seeking to sustain. That court decided in a case similar to the one at bar, (*In re Antigo Screen Door Co.*, 123 Fed., 249) that a proceeding such as the one here is strictly a proceeding in bankruptcy, while counsel in their brief contend that it is not such, but an independent suit from which there exists a general right of appeal

to the Circuit Court of Appeals, and thence to this court, and, because there is such right of appeal to this court a writ of *certiorari* does not lie. This position is founded upon the proposition that the proceeding in the District Court was one brought with the consent of the defendants, petitioners herein. Counsel reach this result by treating the proceeding in the District Court as in fact two suits. Their argument is that, while petitioners objected to the petition filed by the receiver in bankruptcy on the ground of jurisdiction, and thus did not consent to that proceeding, still, having, after the court had thus decided to exercise jurisdiction and dispose of the property, filed a petition to assert their right in the property and its proceeds, this was tantamount to consenting to the proceeding.

This view seems untenable. The two petitions are in effect but one proceeding. The second petition is virtually but a cross petition. Thus the petitioners objected to being sued in the District Court concerning this property until the court had decided to entertain the suit, and then for the first time assented to a decision upon the merits. Can this be construed as a consent by petitioners to being sued in the District Court? What else could petitioners do? The court had taken possession of the property on which they had a lien, and proposed to sell it and dispose of its proceeds. Certainly petitioners were not obliged to refrain from a participation in the trial on the merits in order to preserve the question of jurisdiction upon appeal. In

Louisville Trust Co. v. Comingor, 184 U. S., 18,

a party was ruled to show cause why he should not turn over money to the receiver in bankruptcy, and the proceedings having continued thereafter to a final order, the lower

court held that "by long acquiescence in that mode of procedure, respondent must be regarded as having consented thereto". But this court held otherwise, saying:

"If the jurisdiction of the District Court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there.

The District Court held that Comingor had voluntarily accepted its jurisdiction, and that he had also consented that the court might proceed against him summarily * * * We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered".

Thus it seems settled that where a defendant has once objected to the jurisdiction, and this objection is disregarded by the court, he may thereafter proceed to the protection of his rights in that proceeding without being held to consent to it within the meaning of the bankruptcy act.

Counsel also say that the question whether a proceeding in the Circuit Court of Appeals was an appeal or a petition for review was simply a question of form. The same might be said of an appeal and writ of error, yet this court has held that the distinction is an essential one and that a writ of error cannot be treated as an appeal or *vice versa*.

The cases of *Scott & Co.* v. *Wilson*, 115 Fed., 284, and *Stelling v. Jones Lumber Co.*, 116 Fed., 261, cited by counsel, will be found on investigation to be cases wherein the

defendant had consented to be sued in the district court, and had at no time interposed any objection thereto.

Counsel also seem to contend that in bankruptcy proceedings there is an appeal to the Circuit Court of Appeals in other cases than those specified in the Bankrupt Act. If such were the fact, it is difficult to understand why section 25a was passed limiting appeals to certain specified cases.

Counsel also devote much time to a discussion of the facts arising upon the merits of the case. As this seems out of place in an application for *certiorari*, where the question is not whether a certain question was decided correctly below, but whether the question, being a substantial one, is of a character to justify its consideration by this court. Upon the question of possession the referee and the District Court found the facts one way and the Circuit Court of Appeals reached a contrary conclusion. This is sufficient to show that the question is a substantial one.

Respectfully submitted,

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Counsel for Petitioners.